Supreme Court, U.S.
FILED
FEB 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-920

GENERAL CRUDE OIL COMPANY,
Petitioner

v.

DEPARTMENT OF ENERGY and
UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals

REPLY BRIEF OF PETITIONER

JAMES V. CARROLL, III
EDITH H. JONES
ANDREWS, KURTH, CAMPBELL & JONES
2500 Exxon Building
Houston, Texas 77002

Attorneys for Petitioner
General Crude Oil Company

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-920

GENERAL CRUDE OIL COMPANY,
Petitioner

v.

DEPARTMENT OF ENERGY and
UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals

---

REPLY BRIEF OF PETITIONER

ARGUMENT

FEA's Brief in Opposition ("Opposition")[1] crystallized and dramatized the important issues that warrant review by this Court.

---

1. Citations to the Opposition will be identified by the abbreviation "Opp."

1. FEA's *post hoc* rationalization regarding the "substantial change" test.

Seeking to obscure the *post hoc* rationalization issues, FEA described (Opp. 4, 5) the remedial order's holding regarding the "substantial change" test and TECA's treatment of the same issue on appeal. FEA described fairly the holding of the remedial order (i) that underground chemical changes were "merely incidental" (Pet. App. A-35) to the removal process (thus acknowledging to this Court that the "substantial change" test was not applied to the underground phase), while (ii) the above-ground blending and treating processes did not constitute "substantial change" (Pet. App. A-35). However, FEA refused to deal with General Crude's contention and misrepresented TECA's holding with respect to this issue. The Opposition stated:

> "The Court of Appeals properly held . . . that the changes caused by blending were not substantial . . . Petitioner contends that (TECA's) analysis disregards the physical change caused by *in situ* combustion by dismissing it as incidental to the removal process . . ." (Opp. 5).

But TECA did not deal solely with the above-ground blending process, while dismissing the underground chemical changes occasioned by *in situ* combustion as "incidental." To the contrary, TECA engaged in an analysis of the underground chemical changes and concluded that they were "insubstantial" (Pet. App. A-2, A-13). TECA clearly engaged in blatant, *post hoc* rationalization, because the remedial order did not make any such analyses and did not apply the "substantial change" test to the underground chemical changes, as TECA did.

(See argument and authorities cited at pages 14-19 of the Petition.)

2. FEA's *post hoc* rationalization regarding the statutory purposes issue.

Regarding the statutory purposes issue, FEA again refused in its Opposition to reckon with General Crude's deliberate analysis and argument (Pet. 19-21), choosing instead to engage in a new *post hoc* rationalization argument to this Court. FEA correctly stated (Opp. 6) that TECA held that FEA's orders served the statutory goal of "equitable distribution of crude oil, residual fuel oil, and refined petroleum products" (Pet. App. A-10). That was a true statement of what TECA held. However, neither FEA's remedial order nor its appeal decision cited or relied upon that statutory goal (Pet. App. A-48, A-51, *et seq.*). FEA further stated in its Opposition, ". . . and, of course, it (the order) advanced the congressional goal of controlling producer prices" (Opp. 6). But neither TECA (Pet. App. A-10) nor the agency orders (Pet. App. A-48, A-51, *et seq.*) justified the challenged agency action on the basis of an alleged "congressional goal of controlling producer prices."[2]

Thus, the Court is here privileged to observe first-hand the kind of *post hoc* rationalization that FEA has persisted in advancing throughout the judicial phase of these proceedings. Such *post hoc* rationalization cannot be used by TECA or by FEA in argument to this Court, as justification for agency orders that are mute as to such matters.

---

2. In fact, nowhere in the statutory goals of the EPAA is there stated a policy objective of singling out "producer prices" for control (Pet. App. A-73, A-74).

Apart from the *post hoc* nature of these statutory policy arguments, they are patently ill-founded. FEA has repeatedly acknowledged that General Crude's customer Armour is and always has been privileged to sell Product 15 as residual fuel oil ("resid") and at a resid price (Pet. 9, 12, 13). Therefore, General Crude's refunds and price reductions to Armour would not benefit Armour's customers. Although General Crude has protested this senseless "windfall profit" to Armour at each and every step of the agency and court proceedings, FEA has refused to acknowledge the significant implications of Armour's disparate treatment, to the statutory goals issue. In Summary, since Armour is permitted to sell Product 15 as resid, which after June 1, 1976, has been totally exempt from price and allocation controls (Pet. 13), while General Crude must sell the identical product as crude oil and at a crude oil price, the *post hoc* rationalization arguments based on "equitable distribution" and "price control" considerations are revealed to be absurd. Far from being a rational component of a rational price and allocation control program, such a result constitutes mindless regulation, for regulation's sake only, and without any intellectually honest policy discussion to justify it.

It is not surprising that the District Court could find no support for the agency's action in the statutory goals of the EPAA (Pet. App. A-23, A-25). (See argument and authorities cited at pages 23 and 24 of Petition. And see *University of Southern California v. Cost of Living Council*, 472 F.2d 1065, 1069 (TECA 1972), *cert. denied*, 410 U.S. 928 (1973): "If the haste necessitated gave rise . . . to actions plainly without the purposes of the (statute), then we will readily rectify them.")

Finally, even assuming, *arguendo*, that TECA's holding and FEA's new argument constitute valid statutory policy supports for the agency's action, it is not proper for TECA or FEA's appellate counsel to supply a valid rationale. The agency's decision must contain that rationale in order to be valid.

3. General Crude's right to a hearing.

At pages 6 and 7 of the Opposition, FEA seriously misapprehended and misrepresented General Crude's argument concerning its right to a hearing. FEA's Opposition stated that this case involved "no disputed factual issues" (Opp. 8). That statement was simply not accurate. During proceedings before the agency, General Crude tendered to FEA detailed evidence of indicia of chemical change associated with the cracking process (Pet. 7, fn. 2) and additionally tendered certain factual representations upon which its defense was based, including representations that the combined below- and above-ground processes produced chemical changes that made Product 15 "materially and substantially different" from the natural state crude oil (Pet. 10). General Crude requested a hearing in the event that the agency disputed any of these facts (Pet. 9, 10). Inasmuch as TECA (i) decided the case in *post hoc* reliance upon part (the 15° to 17° change of API gravity), but not all of the chemical analyses supplied by General Crude (Pet. 17) and (ii) reached a conclusion (that the chemical change was not "substantial") different from the representations tendered by General Crude (Pet. 18), it is obvious that General Crude's case was materially disadvantaged by the agency's refusal to accord it a hearing to prove its assertions. Of course, it was not until FEA lost the case

in the District Court that it first challenged General Crude's factual contentions before the agency. (See argument and authorities at pages 26-30 of the Petition.)

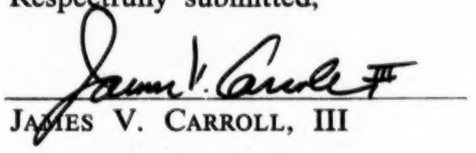
Considering that the agency intends to seek substantial monetary fines from General Crude (Pet. 12) in addition to the $5 million refund, if TECA's decision is not overturned, the constitutional infirmity of denying General Crude a hearing becomes even more apparent.

CONCLUSION

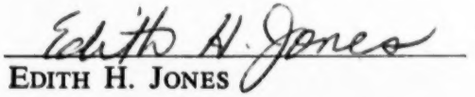
FEA hopes this Court will consider General Crude's case unimportant, because FEA contends that the case "involves no legal question of general importance" (Opp. 3). However, FEA's Opposition and the issues identified herein reveal the glaring procedural deficiencies that have been condoned in this case and perhaps in the other tens of thousands of such informal compliance proceedings before FEA, as well. To the author's knowledge, under the regulations cited by FEA in its Opposition (at page 7, fn. 6), in which FEA has discretion to grant a hearing, the agency has never granted a hearing to any person—*not even once.*

Refusing to grant General Crude a hearing under the circumstances of this case, while engaging in a variety of *post hoc* rationalizations to justify an otherwise indefensible remedial order, is descriptive of an agency adrift of proper administrative law and due process moorings. Such circumstances certainly do not describe a case that is devoid of "general importance." When an agency displays callous disregard for fundamental fairness and due process, it is certainly a matter of "general importance" to all.

Respectfully submitted,



JAMES V. CARROLL, III



EDITH H. JONES

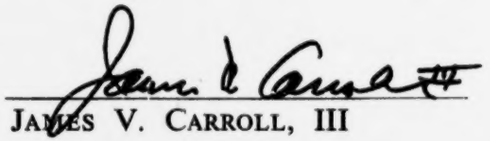
ANDREWS, KURTH, CAMPBELL
& JONES
2500 Exxon Building
Houston, Texas 77002

Attorneys for Petitioner
General Crude Oil Company

DATED: February 14, 1979.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply Brief of Petitioner have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, as required by Rules 21.3 and 33 of the Supreme Court Rules; that three copies have been served upon the Department of Energy; and that one courtesy copy has been served upon Sunland Refining Corporation through its counsel of record, William A. Long, at Latham, Watkins & Hills, 1625 K Street, N.W., Washington, D.C. 20006.



JAMES V. CARROLL, III